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EXAMINER

DUCKWORTH, BRADLEY

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/356,771
Filing Date: July 16, 1999
Appellant(s): PORCELLI, JOSEPH E.

Thomas Galgano
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3/4/10 appealing from the Office action
mailed 8/11/09.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5938160	Hartmann et al.	8-1999
Des.228335	Jackson	9-1973

5297767	Miller et al.	3-1994
5839711	Bieck et al	11-1998

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 18 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hartmann et al(US005938160) in view of Jackson(D228335) further in view of Bieck et al(US005839711). Hartmann discloses a unitary plastic beverage container holder comprising: a basket (14) having two side walls (in Fig. 3, defined as the left and right portions of 10 when split into equal halves) each having a top edge (at 15 - Fig. 1) collectively defining a top end opening, the two side walls disposed opposite one another and each having at least two openings (the openings are separated by member

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14 shown in Fig. 1) there through disposed beneath the top edge border, four resilient flat fingers (16) one end of the fingers coupled to the top edge border of the basket and a second free end of the fingers depending from one of the top edge borders such that they each extend downwardly and inwardly into a different one of the side wall openings, and a generally U-shaped hook (18) attached to and extending above the basket. Hartmann does not disclose the basket and opening being rectangular or the use of V-shaped fingers. First with regards to shape, the use of rectangular holders for rectangular beverages is well known, as taught by Jackson. Referring to the figures of Jackson a rectangular holder is shown that can hold either rectangular or cylindrical containers. It would have been obvious to one of ordinary skill in the art at the time of invention to make the holder of Hartmann rectangular to hold rectangular containers. As stated above Hartmann discloses a holder with resilient fingers; however Hartmann does not disclose the use of V-shaped fingers that point inwards and have a V-shaped profile when viewed in a vertical plane. Bieck et al teaches another cup holder with resilient V-shaped fingers (28 in figure 2) that define an angle and point inwards, the fingers for providing a secure fit for different sized containers placed in the holder, with suitably sized containers placed in the holder only contacting the point of the v shaped fingers. It would have been obvious to one of ordinary skill in the art at the time of invention to make the flat resilient fingers of Hartmann V-shaped as taught by Bieck as this would allow the holder to securely support different sized containers as taught by Bieck. It should be noted that the claim requires that the fingers define a point of a V

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between the ends of the fingers, which could refer to any point on the V-shaped profile between the two ends.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al(US005297767) in view of Jackson (D228335) further in view of Bieck et al(US005839711). Referring to figure 2 Miller teaches a beverage container comprising a rectangular tray (20) and a pair of spaced apart openings (30 and 40) the openings each having a set of four inwardly extending flat resilient members (45), the members having a first end attached to the top wall of the rectangular tray and a second free end extending inwardly towards one of the openings. The support comprising support members (38 and 48) rotatable to below the openings. Miller however does not teach the use of a rectangular opening or the use of V-shaped resilient members. First with regards to shape, the use of rectangular holders for rectangular beverages is well known, as taught by Jackson. Referring to the figures of Jackson a rectangular holder is shown that can hold either rectangular or cylindrical containers. It would have been obvious to one of ordinary skill in the art at the time of invention to make the holes of Miller rectangular to hold rectangular containers. As stated above Miller discloses a holder with resilient fingers; however Miller does not disclose the use of V-shaped fingers. Bieck et al teaches another cup holder with resilient V-shaped fingers (28 in figure 2) that define an angle and point inwards and have a V-shaped profile when viewed in a vertical plane, the fingers for providing a secure fit for different sized containers placed in the holder. It would have been obvious to one of ordinary skill in the art at the time of invention to make the fingers of Miller V-shaped as taught by Bieck

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as this would allow the holder to securely support different sized containers as taught by Bieck. It should be noted that the claim requires that the fingers define a point of a V between the ends of the fingers, which could refer to any point on the V-shaped profile between the two ends.

Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al in view of Jackson in view of Bieck et al and further in view of Pratt(US004530480). Miller in view of Jackson in view of Bieck et al teaches a beverage holder as detailed above, which does not disclose the use of a spring to bias the supporting member (38 and 48) into position below the opening. Pratt discloses a container holder (fig 2) having a spring means (60) for biasing a support member (44) into a lowered position. It would have been obvious to one of ordinary skill in the art at the time of invention to modify the holder of Miller to include a spring means as taught by Pratt as this would allow automatic positioning of the support member as taught by Pratt (col. 5, Lines 2-11).

(10) Response to Argument

The response to arguments will be presented using the same numbering scheme as appears in the arguments section of the appeal brief.

A.

1. Claim 18. Appellant first argues that neither Hartmann, Jackson nor Bieck teach the use of V-shaped fingers as recited in claim 18, specifically V-shaped flat resilient fingers which define a point of a "V" between said ends thereof. Appellant also argues that there is no teaching in Hartmann or Jackson for changing the round holder

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of Hartmann into a rectangular holder as shown in Jackson, the appellant then argues since there are no fingers in Jackson the two references can not be combined. The examiner disagrees, as stated in the above rejection one of ordinary skill in the art would recognize that changing the shape would allow the container to hold circular and rectangular containers, and was viewed as an obvious design choice as holders of different shapes perform substantially the same function in substantially the same manner. Appellant then argues that the Bieck reference does not teach V-shaped fingers. The examiner disagrees, as stated above and can be seen in figure 2, when the fingers are viewed from the side in a vertical plane they define a flat wide V-shape and also define a point, which could be any point, on the v-shaped fingers that points inward with inclined surface(28) and surface(30, lower 30) forming the legs of the V. The examiner does acknowledge that the fingers are a wide and substantially V shaped, however this was seen as meeting the claim language. Appellant then argues there only by the use of Improper hindsight can the references be combined in the manner suggested. The examiner disagrees, as stated above one of ordinary skill in the art would recognize the interchangeability of the resilient fingers of Hartmann and those of Bieck, especially given the teachings of Bieck that the fingers can be used to provide secure attachment for various sized containers.

2. Claim 20. No separate arguments for claim 20 are presented.

B. Claim 21. For the second embodiment Miller was used in place of the Hartmann reference, with Jackson and Bieck still being used as before. Appellant argues once

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again that it would not have been obvious to change the shape of Miller, given Jackson and that none of the references, in particular Bieck, teach V-shaped fingers. Arguments presented in section A-1 above apply here as well, with Miller replacing Hartmann.

Appellant also argues that Miller requires two separate support members, as opposed to the single member disclosed by Appellant, it should be noted that the claims do not limit the number of support members, as such the number of support members in the reference is irrelevant as long as it at least has the one claimed support member.

C. Claim 22, here Appellant merely argues that Pratt does not teach V-shaped fingers, however as stated in the rejection above Pratt was not cited to show V-shaped fingers, no specific arguments directed to the rejection of claim 22 are presented here.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Bradley H Duckworth/

Examiner, Art Unit 3632

Conferees:

/J. ALLEN SHRIVER II/
Supervisory Patent Examiner, Art Unit 3632

/Heather Shackelford/
Appeal conference Specialist